

IN THE HIGH COURT OF LESOTHO

In the matter of :

LESOTHO FOTO LABORATORIES & LIGHTING
DISTRIBUTORS (PROPRIETARY) LIMITED

Plaintiff

v

MARCELLUS BOFIHLA NKUEBE

Defendant

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice
T.S. Cotran on the 17th day of November 1980

This is a claim for provisional sentence on a cheque in the sum of M2413.35 drawn by the defendant in plaintiff's favour. The requisites for provisional sentence are :

- (a) that the document on which the plaintiff sues is liquid. A cheque is.
- (b) that the defendant is unable to adduce such counterproof as will satisfy the Court that in the principal case the probabilities of success would be against the plaintiff.

The defendant opposes the claim and avers simply

- (a) that he is not indebted to the plaintiff,
- (b) that the cheque was drawn by him in plaintiff's favour by mistake,
- (c) that he has a bona fide defence to the claim.

The nature of the bona fide defence has not been disclosed in the defendant's affidavit.

In a replying affidavit the plaintiff avers that the cheque was given in payment for goods sold. A photocopy of the list of goods delivered and the price of each item with the signatures of the defendant and an official in the plaintiff's company was appended.

Mr. Masoabi on defendant's behalf argues, not very persuasively I am afraid,

/(a) that.....

- (a) that the defendant "has no money", and
- (b) that the defendant has a dispute with the plaintiff over other matters with the company.

This is, with respect, an argument devoid of merit.

The balance of probabilities which the defendant must raise must be substantial before the Court will refuse provisional sentence (Davis v. Saxe 1953(3) S.A. 114 at 121) and mere conjecture or slight probability - will not suffice Ternant v. Lamb 1947 (2) S.A. 659) and further the question of probability must be based on facts raised in the affidavit itself (Inter-union Finance Ltd. v. Franskraalstrand Bpk 1965(4) 180 at 192.

Provisional sentence entered as prayed for plaintiff with costs.


CHIEF JUSTICE
17th November 1980

For Plaintiff: Mr. Koornhof
For Defendant: Mr. Masoabi